Western Kentucky University

and

Green River Educational Cooperative

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Emerging Legal Issues for Administrators: How to Stay Out of Hot Water

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I. VERDICTS AND SETTLEMENTS

1. Verdict: $2,003,000 – An elementary school principal sued a Connecticut school board, the assistant superintendent, and former superintendent over retaliation, discrimination and intentional infliction of emotional distress. The principal alleged that after she reported two white teachers for abusing two minority children at the school, she was transferred to a small school with a smaller salary and less prestige. She also claimed that in retaliation she was later placed on an administrative leave for allegations against her of improper behavior toward students. The principal was reinstated by the school board by community pressure but prior to the State Department of Children and Families' determination that the allegations were unsubstantiated. The Board denied that it acted improperly. The jury awarded the principal $1 million in non-economic damages, $1 million in punitive damages, and $3,000 in economic damages.

2. Verdict: $1,858,247 – A private school director sued the school for wrongful termination in violation of public policy. The 12-year director claimed that she was terminated after refusing to violate California law that caps enrollment regarding child-teacher ratio. The school denied these allegations, and claimed that the school terminated the director after a parent complaint. The jury awarded the former director $500,000 in general damages, $608,247 in special damages, and $750,000 in punitive damages.

3. Verdict: $1,410,709 – A classroom elementary school teacher sued the school district for disability discrimination, failure to accommodate, and failure to rehire because of her disability. The teacher claimed that after a work-related injury and knee surgery, she tried to return to the school in a more sedentary position. She contended that the district refused to allow her to work as a counselor, a position she had filled before. The teacher also alleged that she was passed over for more than 20 other positions at the district because of her disability. The district denied the allegations, and contended that the teacher refused to consider returning to the classroom even with accommodations. The jury found for the teacher on the failure to accommodate claim and awarded her $1,328,709 in economic damages and $82,000 in noneconomic damages. The jury also found that the district did not discriminate against the teacher based on disability.

4. Verdict: $1.2 million – Thirteen teachers sued a school district south of Pittsburgh for age and sex discrimination in violation of Age Discrimination and Employment Act and the Equal Pay Act. The teachers claimed that they were all experienced teachers from other school districts and the district hired them at the bottom of the pay scale. They also claimed that younger female

and male teachers hired were brought in at a higher pay scale. The school district denied discrimination and asserted that it followed standard hiring procedures. However, the jury found that the teachers should have been in higher pay grades and ordered the district to move them up. Twelve teachers shared in the verdict, with one teacher not receiving any damages. The jury also found willfulness on the part of the district.

5. Verdict: $1,176,000 – Three male soccer coaches sued the University of Southern Mississippi, the president, two athletic department employees, the athletic director, and the senior women's administrator for sex discrimination and sexual harassment. The head coach and one assistant alleged that the women's administrator made up derogatory student statements against them and undermined their authority by traveling with the team. Both coaches alleged that they were fired without due process. The administrator was alleged to have made sexual advances to one coach, and when rebuffed, fired in retaliation. They also contended that the officials preferred a woman in the girl's coaching position. The university denied wrongdoing. The jury awarded $500,000, $376,000, and $300,000 to the three former coaches.

6. Verdict: $1,012,720 – A probationary teacher sued a California school district for sex discrimination. The teacher alleged that she received good reviews until she returned from a pregnancy leave, and that a new principal did not renew her contract. She claimed that she asked for a room to pump breast milk, and found herself off the leadership team. The teacher also contended that she was let go when she was pregnant with her second child, and had been unable to gain new employment throughout the district. The school denied the allegations, and maintained that the state education code required neither cause nor reason for the non-reelection, which was made without discriminatory animus.

7. Settlement: $600,000 – A white teacher sued a Georgia school district for race discrimination. She claimed that she was denied a permanent position as director while serving as the interim director because she is white. She contended that all five Board members believed that the district's staff was too white. The teacher also claimed that the interview committee recommended her. The district denied wrongdoing and asserted that all the Board members thought that the teacher was unqualified.

8. Settlement: $567,500 – A former athletic director sued a New York school district for retaliation in violation of his free speech rights. The former director claimed that initially he was demoted after he criticized the district for its alleged mishandling of a 14-year-old boy's claim of humiliating hazing by

another student. Soon after the district claimed that it was reorganizing his department, and he lost his job. The district denied wrongdoing.

9. Settlement: $555,000 – A former superintendent sued a Florida school district for wrongful termination. The former superintendent alleged that the School Board illegally fired him in violation of Florida's Sunshine Laws, and a conspiracy of Board members to get rid of him. The Board maintained the superintendent failed to perform his duties. It was asserted that the superintendent failed to uniformly award credit to students that took advance placement courses. Reports show that some students received different credits for the same courses. The Board maintained there was little evidence that any violation of law ever occurred. The settlement includes the superintendent, and his wife, continuing to receive health insurance until he is eligible for Medicare.

10. Settlement: $130,000 – A new school principal sued an Oklahoma School Board for retaliation alleging that he was transferred for speaking out about inaccurate test scores at his previous school. He claimed that the Board understated the progress of the students, resulting in inaccurate figures. He reported his allegations to authorities. As part of the settlement, the principal resigned and received salary and benefits through the end of the school year.

11. Verdict: $117,000 – A 27-year veteran female basketball coach sued an Ohio school board, the principal, and the athletic director for age and sex discrimination. The former coach claimed that after serving for years as the girls' basketball coach, she was suspended and her contract was not renewed after a confrontation with a parent. She contended that the athletic director suspended her because of her age and sex. The school board denied discrimination. The jury found for the coach on the age discrimination claim, and awarded $15,837 in back pay, $2,000 in front pay, and $100,000 in compensatory damages. The jury found for the school, principal, and the athletic director on the sex discrimination claim. The case settled before the issue of punitive damages against the athletic director was submitted to the jury. Total settlement: $398,831.

12. Verdict: $240,000 – An associate principal sued the school district for disability discrimination. The former associate claimed that she was demoted to classroom teacher by the high school principal when he perceived her as disabled. She alleged that because she suffered anxiety attacks, the principal decided that she had a disabling condition and could not function in her previous capacity. The former associate was a 25-year veteran in the school district. The school denied wrongdoing. The jury awarded the former

associate principal emotional distress damages. She will ask for front pay or reinstatement.

13. Settlement: $200,000 – A 58-year-old boys' basketball coach sued a high school for wrongful termination in violation of the Age Discrimination in Employment Act. The award-winning coach was sought after for the position of varsity coach by the athletic director and a board member, but a 28-year-old coach won the job. The school denied wrongdoing.

14. Verdict: $200,000 – A white female former high school assistant principal sued a school board in Virginia and its superintendent for race and sex discrimination, and retaliation. The former assistant principal alleged that the district failed to promote her to principal because of her race, in favor of a lesser qualified black male applicant. She claimed that, after the former principal became ill, she assumed his primary responsibilities and duties, but when he decided to retire, the superintendent made it clear in her presence that he intended to promote an African American to the position because his goal was to have the first black principal under his tenure. She contended that despite her better qualifications and experience, the superintendent made good on his promise to promote a black person, that he sabotaged her application, failed to give her an interview, accused her of poor performance and not getting along with others, and also recommended that she be demoted from assistant principal to a teaching position. She also claimed that the school board originally rejected the superintendent's recommendation for his first and second choice of black male candidates, but they finally accepted his second choice. She asserted that when she engaged in protected activity regarding their unlawful discrimination, based on her race and sex, she was retaliated against including, but not limited to, demoting her to a middle school teaching position with a decreased salary. The school board and the superintendent denied any wrongdoing.

15. Verdict: $185,000 – A special programs director sued a Washington school district for disparate treatment, defamation, retaliation, constructive discharge and other claims. The former director claimed that the district initiated false rumors that she was having an affair with the superintendent. She also alleged that she was forced to resign based on the district's retaliatory demotion and being targeted due to her ethnicity. The district denied wrongdoing. It contended that the district had no choice but to investigate the rumors. It also claimed that the former director was reporting more hours on her timesheet than she worked, and the superintendent approved it. The jury awarded the former director $35,000 in economic damages, $75,000 in noneconomic damages, and $75,000 in presumed damages on the defamation, retaliation, constructive discharge and disparate treatment claims based on sex or race.

16. Settlement: $100,000 – The EEOC sued a Catholic elementary school in Honolulu. The EEOC claimed that a Filipino bookkeeper was subjected to sex and national origin discrimination, and retaliation by a priest, and her supervisor. The bookkeeper alleged that the men made derogatory comments about her culture and features. She also contended that when she complained, the school did not investigate. The EEOC asserted that the bookkeeper was closely watched, and terminated after complaining. The school district denied discrimination, and contended in a written statement in part, that it "…intends to follow its current policy of nondiscrimination…"

17. Settlement: $100,000 – A former interim police chief sued the district for whistleblower violations claiming that he was suspended and subsequently terminated because he reported suspected criminal activity of fellow coworkers to the Harris County District Attorney's Office. He also sued the interim superintendent and five board members because they allegedly defamed him or conspired to defame him, by falsely accusing him of stealing a computer. The former chief further contended that the coworkers tried to disrupt the criminal investigations by vilifying his reputation and integrity. The district denied wrongdoing. The district agreed to send letters to the Houston police department and the Texas Commission on Law Enforcement Officer Standards and Education, clearing the former chief of all alleged wrongdoing.

18. Settlement: $35,000 – A former high school counselor sued a school district for retaliatory discharge. The counselor claimed that she was harassed and fired in retaliation for complaining of sexual harassment. She alleged that after filing a defamation action against the principal, she was demoted and subsequently discharged. The counselor further contended that the principal sent her e-mails with sexual pictures and made sexual comments to her. The school and principal denied wrongdoing. The school contended that the counselor was suspended and terminated for violation of policy when she did not report suspected child abuse.

II. SUPREME COURT DECISION (WITH EMPHASIS ON RETALIATION)

Crawford v. Metropolitan Government of Nashville and Davidson County, ___ U.S. ___, 129 S.Ct. 846 (2009)

The Court held that under Title VII an employee who participates in any investigation proceeding or hearing is protected when questioned in the course of an internal investigation.

The Facts

The Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro"), Human Resources Department initiated an internal investigation in response to allegations of sexual harassment against an officer in the school district. HR interviewed several female employees, including 30-year old payroll department employee, Vicky Crawford. During her interview, Crawford complained of several instances of alleged sexual harassment.

Following the investigation, Metro issued a report, which concluded that Hughes had engaged in inappropriate conduct, but found that it was unable to corroborate the most egregious allegations of misconduct and chose to issue only a verbal reprimand to Hughes.

Around that same time, Metro commenced the investigation of the business practice that was in the payroll department. A few months later, Metro terminated Crawford on the stated basis of embezzlement – accusations that Crawford denied. Crawford brought suit alleging that Metro unlawfully retaliated against her in violated of Title VII of the Civil Rights Act of 1964. The Trial Court issued summary judgment in favor of Metro and the Sixth Circuit Court of Appeals affirmed, noting that Crawford had not "instigated or initiated" any complaint prior to her interview, and the Court of Appeals found that merely providing unfavorable information about Hughes in the interview "is not the kind of overt opposition that we have held as required for protection under Title VII."

The Legal Question

Whether Title VII's opposition clause protects an employee who voices objections to discrimination – not on her own initiative, but, instead, in response to an employer's questioning.

The Supreme Court's Decision:

In a unanimous decision written by Justice Suiter, the Supreme Court reversed the Sixth Circuit and found that the opposition clause extended to Crawford's complaints. The Court determined the meaning of the statutory term "oppose" as meaning "to resist or antagonize …; to contend against; to confront; resist; withstand …." The Court observed that an EEOC guideline states that "[w]hen an employee communicates to her employer a belief that the employer has engaged in … a form of employment discrimination, that communication" nearly always is deemed the employee's opposition to the employment activity. The Court concluded that the opposition clause applied to Crawford's complaints because her

statements in the internal investigation were an "ostensibly disappointing account of sexually obnoxious behavior toward her by a fellow employee."

Ramifications for Employers:

The Court's holding may discourage employers from conducting an expansive investigation for fear that other employees, in the course of that investigation, may voice complaints of discriminatory conduct.

To what extent will the Crawford holding be expanded to other contexts such as the "silent opposition" scenario? What if an employee voices disapproval of a supervisor's behavior in a casual conversation with other non-management co-workers?

No Justice suggested there should not be protection for at least some form of silent opposition. The refusal to discriminate against subordinate employees is an obvious example, but so is failure to respond when the employer asks employees who would be willing to provide testimony in support of the employer. There are also cases in which the employer preemptively fires employees who are suspected of intending to file an EEOC charge or support a complainant.

The Message for Employers is Clear:

An adequate internal investigation should include steps to protect the employees who cooperate in good faith with it, and any contemplative adverse action against employees who reveal wrongdoing should be scrutinized closely before it is put into effect.

Jackson v. Birmingham Board of Ed., 544 U.S. 167, 125 S.Ct. 1497 (2005)

The Facts

Roderick Jackson, a high school basketball coach, claimed he was fired for complaining that the girls' basketball team he coached was denied equal treatment by the school. Jackson sued the Birmingham Board of Education in federal court, claiming his firing violated Title IX of the Education Amendments of 1972. Title IX bans sex discrimination in federally-funded schools. Jackson claimed Title IX gave him the right to sue - a "private right of action" - because he suffered for reporting sex discrimination against others, despite the fact the he did not suffer from sex discrimination. The federal district court and appellate court ruled against Jackson.

The Legal Question

Does Title IX of the Education Amendments of 1972 allow suits for retaliation for complaints about unlawful sex discrimination?

The Supreme Court's Decision

In a 5-4 opinion delivered by Justice Sandra Day O'Connor, the Court held that Title IX allowed suits alleging retaliation for reporting sex discrimination. Such retaliation, the majority reasoned, constituted intentional discrimination on the basis of sex in violation of Title IX. Jackson therefore had the right under Title IX to pursue his claim in court.

Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53, 126 S.Ct. 2405 (2006) is another significant retaliation case by the U.S. Supreme Court. In this case, the Trial Court had found in favor of the employee who had worked in the railroad company's yard. She had complained to company officials that her immediate supervisor had repeatedly told her that women should not be working in his department and had made additional insulting and inappropriate remarks to her. The matter was investigated by the company and the supervisor was suspended for 10 days. After the employee complained, she was reassigned to a more difficult position and subsequently filed a second charge of discrimination. After an internal investigation, she was reinstated after 37 days with full back pay. After which, she filed a third charge with the EEOC.

The Sixth Circuit reversed the judgment issued by the Trial Court and found that she had not suffered of adverse employment action. This decision was reversed by an *en banc* decision of the Court and the U.S. Supreme Court then heard the case.

The Court adopted a far more expansive approach requiring that the Plaintiff show only "that a reasonable employee would have found the challenged action materially adverse, which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination. The Court found that while reassignment of job duties is not automatically actionable, where the facts indicate that the new position was more arduous and dirtier, it could conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee. This standard of whether the action "could well dissuade a reasonable worker" established a new expanded definition for retaliation.

The Bottom Line:

Retaliation is now easier for an employee to prove. Under previous decisions, the Courts had held that even if the underlying claim of discrimination was without merit, an employer could still be held for retaliation against the employee for complaining about discrimination. These decision not only reinforces those earlier

cases, it adopts a standard that a jury must determine whether the employer's actions "could well dissuade a reasonable worker for making or supporting a charge of discrimination." As a result of the decisions in Metro and White, there will be more retaliation claims.

Fitzgerald v. Barnstable School Committee, ___ U.S. ___, 129 S.Ct. 788 (January 21, 2009). This case involved a peer-to-peer sexual harassment claim under Title IX in a U.S.C. §1983 claim filed against a school district, the governing board and the superintendent. The parents of a kindergarten student in Massachusetts claimed that their daughter was being bullied into lifting her dress and doing other highly inappropriate things by a third grade boy who rode the same school bus. Following prompt action by school officials and a concurrent investigation by law enforcement detectives specializing in juvenile matters, the third grader was found to be credible in his denials. Nevertheless, the parents sued, and a District Court granted the Defendants' motion to dismiss, failing to find any evidence of deliberate indifference since the District engaged in a full-fledged and diligent investigation as soon as it became aware of the allegation of harassment.

CBOCS West, Inc. v. Humphries, ___ U.S. ___, 128 S.Ct. 1951 (2008) the Supreme Court held that 42 U.S.C. §1981 encompasses retaliation claims. In this case, the plaintiff had sued under both Title VII and Section 1981 alleging he had been fired because of his race and because he had complained about another employee being fired because of race. His Title VII claim was dismissed because of his failure to timely pay filing fees, but the Court held that he could pursue his 1981 claim holding that that Section includes retaliation claims.

The First Circuit Court of Appeals affirmed and the U.S. Supreme Court granted certiorari and on January 21, 2009, determined that the parents had a right to pursue a §1983 action alleging unconstitutional gender discrimination in school even though the matter had been handled promptly and efficiently by the school and law enforcement officials.

III. KENTUCKY'S WHISTLEBLOWER ACT - KRS 61.102

A. Employer cannot discriminate against employee who

1. In good faith reports, discloses, divulges, or otherwise brings to the attention of the Kentucky Legislative Ethics Commission, the Attorney General, the Auditor of Public Accounts, the General Assembly of the Commonwealth of Kentucky, or any of its committees, members, or employees, the judiciary or any member or employees of the judiciary,

any law enforcement agency or its employees, or any other appropriate body of authority[1]

2. Any facts or information relative to an actual or suspected violation of any

   - Law, statute, executive order, administrative regulation, mandate, rule or ordinance or any other facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety

B. An employee may file a civil action for appropriate injunctive relief or punitive damages, or both

   1. Within 90 days after occurrence of the alleged violation

   2. Consolidated Infrastructure v. Allen,[2] limits the 90-day period within which to file suit to injunctive relief

   3. Employee must show by preponderance of the evidence that disclosure was a contributing factor in the personnel action

   4. If *prima facie* case of reprisal has been established and disclosure determined to be a contributing factor the burden of proof of proof shall be on the agency to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action.

ADVERSE VERDICTS FOR EMPLOYERS

- Two teachers in Henry County were awarded $500,000 each for the punishment received after reporting that improper test procedures were being used in that school district.

- A former director of a medical clinic in Meade County was awarded $99,428 where the jury found her termination was based on her efforts to bring fraud to light by reporting it to her own employer.

- Two former Kentucky Department of Agriculture employees received verdicts of $1 million each in Franklin Circuit Court. The employees claimed that they

[1] In Workforce Development Cabinet v. Gaines, _____S.W.3rd_____, 2008 WL 5046776, the Kentucky Supreme Court held that an employee was protected by reporting perceived misconduct to the employee's own employer.

[2] 269 S.W.3d 852 (Ky. 2008)

were demoted from supervisory positions after taking evidence of pesticide-industry fraud to investigative agencies. The case was originally decided in 1997 with verdicts of $500,000 but the Kentucky Supreme Court later reversed and was retried under much more stringent standards with double the outcome.

- A former principal in the Fayette County school system received over $3.5 million after finding that her firing violated Kentucky's whistleblower act. The employee was fired in 1999 after school officials found a loaded gun in her car. She claimed the officials fired her for revenge after she notified the Office of Education Accountability of an administrator who allegedly falsified documents to obtain a child's confidential records. The jury found that the former superintendent and former middle school director abused their power when they dismissed the employee. The two administrators were penalized a combined $2 million in compensatory damages, and the school district, along with the two administrators, were each ordered to pay $500,000 in punitive damages. In February 2007, the Kentucky Court of Appeals reversed the judgment against the individual defendants, but affirmed the $500,000 judgment against the Board

Recommendation: This is currently a hot area. The large verdicts indicate juries are sympathetic to employees who report alleged wrongdoing by a school district. As sovereign immunity will not bar these claims, you should consult your attorney before taking any personnel action that could result in a whistleblower claim.

IV. IMMUNITY – WHAT ARE ITS LIMITS?

States and their political subdivisions enjoy sovereign immunity. Boards of Education enjoy governmental immunity. Sovereign or governmental immunity is absolute immunity that protects state and public officials acting in their representative or official capacities.

Boards of Education enjoy governmental immunity if they are performing a governmental as opposed to a proprietary function.

Official immunity protects public officers and employees for acts performed in the exercise of their official functions.

Qualified official immunity protects public officers and employees when they are sued in their individual capacity if (1) they are performing discretionary acts; (2) in good faith; and (3) within the scope of the officer's or employee's authority.

To determine whether school employee has qualified official immunity, it must be determined whether the employee is performing a discretionary or ministerial act.

If the act is discretionary, the immunity applies; if the act is ministerial, it does not. A ministerial act is "one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts."

Where is the limit of governmental immunity? The cases regarding governmental immunity have been clear with one notable exception.[3]

The courts have dismissed claims against superintendents, principals, athletic directors, and other administrators holding that their actions were discretionary and not ministerial.[4]

The courts have held that coaches who do not follow an existing rule, police officers who were driving when responding to an emergency, and police officers who permitted a prisoner to steal the vehicle were ministerial acts and they were not entitled to qualified official immunity.[5]

Teachers who did not enforce a rule that resulted in a student's death were determined not to have qualified official immunity.[6]

The current issue is whether a teacher or other school employee who do not have a specific duty spelled out in the statutes, policies or procedures of the Board of Education enjoys qualified official immunity in carrying out his or her duties. In Pennington v. Greenup Co. Bd. of Ed.[7](unpublished opinion), the Court of Appeals held that a teacher who was in charge of a special education student, who was injured on a field trip, was entitled to qualified official immunity where she did not violate any specific rule or directive. The Kentucky Supreme Court declined to hear the case, but ordered the opinion not to be published, which means it cannot be cited as authority.

V. STUDENT ATHLETE INJURIES

There are two cases to watch in this area.

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[3] The case of Breathitt County v. Prater, presently pending before the Kentucky Supreme Court, held at the lower court level that the Board's furnishing of a residence for the custodian to live in was a proprietary and not a governmental function, and therefore the Board did not enjoy governmental immunity. The Supreme Court has accepted discretionary review in this case, heard oral arguments on January 14, 2009, and the decision is not final.
[4] Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001); James v. Wilson, 95 S.W.3d 875 (Ky. App. 2002)
[5] See Lexington-Fayette Urban County Government v. Smolcic, 142 S.W.3d 128 (Ky. 2004); Jones v. Lathram, 150 S.W.3d 50 (Ky. 2004); Pile v. City of Brandenburg, 215 S.W.3d 36 (Ky. 2006).
[6] Williams v. Kentucky Dept. of Education, 113 S.W.3d 145 (Ky. 2003).
[7] 2006-CA-001942

1. Crockett, et al. v. Stinson, et al., is pending in the Jefferson Circuit Court. The then head football coach at Pleasure Ridge Park High School was indicted for reckless homicide for allegedly failing to take steps to prevent Max Gilpin, a student on the football team, from becoming over-exhausted and dying. Suit has been filed in the Jefferson Circuit Court against the head coach, all assistant football coaches, the principal, and the athletic director. It will be some time before this case is decided.

2. Estate of Ryan Owens, et al. v. Duffy, et al., is pending in the Henderson Circuit Court. This case involves the death of Ryan Owens, a member of the Henderson County football team, who died in 2006 following the end of a summer practice session. Suit was filed against the board of education, the superintendent, principal, athletic director, head football coach and all assistant coaches, and a physician who allegedly failed to diagnose mitral valve prolapse. Significant discovery has been taken, but this case is not yet set for trial.

VI. THE FIRST AMENDMENT

It is always difficult to determine which First Amendment cases to discuss, because there are so many covering so many different topics. The following are a selected few significant decisions.

1. Pledge of Allegiance

   On July 23, 2008, the Eleventh Circuit Court of Appeals ruled on a challenge to Florida's Pledge of Allegiance statute.[8] The statute, which applied to all students from kindergarten to 12th grade, provided that the student had a right not to participate in reciting the pledge and upon written request by his or her parent, the student must be excused from reciting the pledge. When the pledge is given, civilians must show full respect for the flag by standing at attention, men removing their headdress, except when headdress is worn for religious purposes. The Eleventh Circuit held that students have the constitutional right to remain seated during the pledge, but that the provision requiring a written request by the student's parent(s) was constitutionally permissible.

2. Display of the Ten Commandments

   In February 2008, U.S. District Court for the Western District of Kentucky ruled that the Grayson Fiscal Court had a "religious purpose" for directing a

[8] Frazier ex rel. Frazier v. Winn, 535 F.3d 1279 (11th Cir. 2008), rehearing denied en banc ____ F.3d ___ (11th Cir. Jan. 26, 2009)

display of the Ten Commandments, which was included in a display of documents titled "Foundations of American Law and Government," which was to be set up in the county courthouse in Leitchfield. The exhibit included a copy of the Ten Commandments, along with several other historic documents, including the Magna Carta, the Mayflower Compact, the Declaration of Independence, and the lyrics to the "Star-Spangled Banner."

Judge McKinley ruled that the religious purpose was evident in that it was initiated and financed by a Baptist minister who wanted a display of the Ten Commandments and that fiscal court members repeatedly focused on the commandments, not the other documents. The case is on appeal to the Sixth Circuit.

Previously, a federal District Judge in Lexington had determined that the Ten Commandments display at the Rowan County Fiscal Court did not have the effect of endorsing religion, but that one in Garrard County may have, and therefore refused to dismiss suit over that display.

3. Outsourcing to Religious School

The Sixth Circuit Court of Appeals ruled that the former principal and two former teachers at a school district's alternative school stated a valid Establishment Clause claim based on the school board's decision to close the school and outsource its services to a private, sectarian school.[9] The Jefferson County (Tennessee) School Board decided to eliminate the district's alternative school and entered into a contract with Kingswood, a non-denominational private religious school, to provide alternative school services for the district. Although literature described the residential program as having a Christian ministry, the description of the day program, which would provide the services for the district, contained no mention of the school's religious ministry. The principal and two teachers brought separate suits against the board and the individual board members.

The Sixth Circuit determined that the board members were entitled to legislative immunity and concluded there was a genuine issue of material fact that the district court would need to resolve in order to determine whether the board had violated the Establishment Clause.

[9] Smith v. Jefferson County School Bd. of Com'rs, 549 F.3d 641 (6th Cir. 2008)

4. Prayer by Coach

   The United States Supreme Court recently refused to hear a case from New Jersey wherein the lower court held that when the football coach used to bow his head and drop to one knee when his football team prayed, that that had the effect of endorsing religion. The coach argued that this violated his free speech right by ordering him to stop action he called "secular signs of respect." After the ban, the coach stood at attention for the remainder of the season when the students prayed.[10]

5. Banning Confederate Flag

   In August 2008, the Sixth Circuit ruled in favor of a Tennessee high school that banned students from wearing clothing with a Confederate battle flag after several racial incidences.[11] School officials said their ban came after racial tension that included a fight, a civil rights complaint, and graffiti of a Confederate flag, a racial slur and a noose. The court held that the school officials had a right to ban the flag because they could "reasonably forecast" that it would disrupt education.

6. Distribution of Bibles in Elementary School

   In January of 2008, a U.S. District Court in Missouri held that the distribution of Bibles to elementary students during school hours on school property violates the Establishment Clause of the First Amendment.[12] This is consistent with other cases holding that Bibles may be only distributed in a specific manner we have discussed in the past conferences and most cases have held they cannot be distributed to elementary school students.

7. Restriction of Students' Rights

   The Fifth Circuit Court of Appeals ruled that a high school student's violent and threatening language in a journal was not protected speech under the First Amendment.[13] Entries in the journal described how the extremist group that was formed at the high school, lead by the author of the journal entries, brutally injured "two homosexuals and seven colored" people. Another entry described how the author set a fellow student's house on fire and brutally

[10] Borden v. School Dist. of Tp. of East Brunswick, 523 F.3d 153 (3rd Cir. 2008), certiorari denied by __ S.Ct. ___, 2009 WL 498167 (U.S. March 2, 2009).
[11] Barr v. Lafon, 538 F.3d 554, 236 Ed. Law Rep. 41 (6th Cir. 2008), rehearing en banc denied by Barr v. Lafon, 553 F.3d 463 (6th Cir. Jan 23, 2009) (NO. 07-5743).
[12] Roark v. South Iron R-1 School District, et al., 540 F.Supp.2d 1047, 231 Ed. Law Rep. 273 (E.D. Mo. 2008)
[13] Ponce v. Socorro Ind. Sch. Dist., 508 F.3d 765 (5th Cir. 2007)

murdered the student's dog. Other entries explained how the group was making plans for an attack to mirror the "Columbine shooting" and plan for "shooting at all the district's schools at the same time."

8. Free Speech

In August 2008, the Eleventh Circuit ruled not to extend First Amendment speech protection to a high school student wearing jewelry in her body piercings. In affirming the district court, the Court of Appeals concluded that seeking to make a statement of individuality was void of a particularized message that the First Amendment was designed to protect.[14]

In 2008, the Sixth Circuit upheld the right of a public middle school to prevent a student from distributing anti-abortion leaflets in the school hallways between classes.[15] Although both parties to the controversy agreed that the leaflet distribution was not likely to cause any disruption, the appellate court declined to employ the *Tinker* standard, and, instead, focused on a forum analysis to conclude that the school's suppression of the student's expression was constitutional.

This eighth-grade student participated in a pro-life day where students were to express their opposition to abortion by wearing red arm bands, distributing factual literature about abortion, remaining silent all day, and wearing red tape over their mouths to symbolize the silence of unborn children. The student was ordered to turn his shirt inside out, which he initially did but then reversed it. The leaflets had not been pre-approved as required by school policy. In reversing the lower court's granting of the temporary injunction, the Sixth Circuit stated that "school areas such as hallways constitute non-public forums" and the school district was therefore entitled to put reasonable and viewpoint-neutral time, place, and manner restrictions on hallway speech and to require pre-approval of any materials to be distributed in school.

VII. THE FOURTH AMENDMENT

In S.E. v. Grant County Bd. of Educ., 544 F.3d 633 (6th Cir. 2008), a middle school student with disabilities (Section 504) passed Adderall tablet to a fellow student on the last day of classes. At the start of the next school year, the assistant principal took written statements from the student and shared the statement with the school resource officer who alerted juvenile authorities. The student was suspended for one day and entered a voluntary diversion program in Juvenile

[14] Bar-Navon Brevard County Sch. Bd., 290 Fed.Appx. 273, 2008 WL 3822612 (2008).
[15] M.A.L. ex rel. M.L. v. Kinsland, 543 F.3d 841 (6th Cir. 2008)

Court on trafficking charges. The lower court decided in favor of the student, but the Sixth Circuit reversed and held that the school's actions were reasonable. The student has requested the United States Supreme Court to hear this case.

VIII. SUSPENSION OF CONTINUING TEACHER CONTRACTS

With the continued issue of reduction in staff, superintendents have asked when they can suspend a contract to teachers. The following is a brief overview of the law.

KRS 161.800 provides:

> When by reason of decreased enrollment of pupils, or by reason of suspension of schools or territorial changes affecting the district, a local superintendent decides that it shall be necessary to reduce the number of teachers, he shall have full authority to make reasonable reduction. But, in making such reduction, the local superintendent shall, within each teaching field affected, give preference to teachers on continuing contracts and to teachers who have greater seniority. Teachers whose continuing contracts are suspended shall have the right of restoration in continuing service status in the order of seniority of service in the district if teaching positions become vacant or are created for which any of the teachers are or become qualified (emphasis added).

There have been very few case decisions that have even mentioned this statute since it was enacted in 1942. However, the Office of the Attorney General has issued opinions that touch on the issues facing the District. In OAG 80-150, the Attorney General responded to an inquiry from the superintendent of Jefferson County Public Schools confirming that in applying the statute, the superintendent must base his decision regarding continuous service contracts to be suspended on both seniority and certification of the teacher.

Essentially, it is the superintendent's responsibility to isolate the teaching field affected and to pinpoint the least-senior teacher in that field. A high school teacher obtains his or her certificate based upon their major and minor areas of concentration in a college or university. Considerable importance is placed upon school systems having their teachers teach in their major or minor field or area of training.

In OAG 80-150, the Attorney General opined that the term "qualified" as contained in the last sentence of the statute must be construed as equivalent to certification. Thus, if a teacher suspended from the teaching field affected is

properly certified to teach in another teaching field in the school system and the suspended teacher has greater seniority than teachers in the field for which he or she is also qualified, then the continuing contract status teacher with the least seniority in that teaching field may be suspended under KRS 161.800, and the suspended teacher may exercise his or her right to "bump" less senior teachers who are also on continuing contact status.

In OAG 78-266, the Attorney General opined that tenured teachers must be employed before any non-tenured teachers are employed or reemployed. Thus KRS 161.800 only applies to tenured teachers. The correct procedure with regard to non-tenured teachers would be to non-renew their contracts by April 30, 2007, in accordance with KRS 161.750.

What are the limits on suspension of teaching contracts?

1. It cannot be used to reduce tenured teachers based on lack of funding.

2. What does "decreasing enrollment of students" mean?

    a. District-wide?

    b. School-wide?

    c. In specific programs?

3. What is a "teaching field affected?"

IX. SUMMARY

The cases continue to challenge administrators in making personnel decisions. The retaliation situation pose a special problem because the underlying claim may be proven to be without any merit and the employee may still be able to recover by proving that the employer retaliated against the employee for complaining about a real or perceived unfair personnel action. As in most personnel matters, documentation is key to successfully defending these claims.